IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE DIET DRUGS (PHENTERMINE/FENFLURAMINE/ DEXFENFLURAMINE) PRODUCTS LIABILITY LITIGATION	MDL No. 1203
SHEILA BROWN, ET AL. v. AMERICAN HOME PRODUCTS CORPORATION	CIVIL ACTION NO. 99-20593

PRETRIAL ORDER NO.____

AND NOW, this ____ day of May, 2005, it is hereby ORDERED that *Class Counsel's Motion to Impose a Bond on Appellants Angela Duffy and Debra Rhea*, is DENIED.

Date:_____

_____
Harvey Bartle, III, Judge

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OBJECTORS' MEMORANDUM IN OPPOSITION TO CLASS COUNSEL'S MOTION TO IMPOSE A BOND ON APPELLANTS ANGELA DUFFY AND DEBRA RHEA

Introduction

Objectors Angela Duffy and Debra Rhea, by and through undersigned counsel, hereby respond to and oppose Class Counsel's Motion for the assessment of an appeal bond, comprised of costs and damages from "delay or disruption of settlement administration caused by a frivolous appeal," on the grounds that, under the law of this Circuit (and others as well), such a bond may not be imposed. This is particularly so under the facts of this case. Class Counsel is improperly attempting to have a bond imposed as an impermissible punitive device to interfere with and curtail the appellate rights of Objectors.

I. APPEAL BONDS MAY NOT BE USED TO ANTICIPATE SANCTIONS ON APPEAL

Class counsel devote the first and lengthiest portion of their Memorandum in support of their motion seeking an appeal bond to an extended defense of their class action settlement. In addition, a central feature of their effort here is an improper, irrelevant, ad hominem, and vituperative attack on the objectors in this case and on objectors in general.[1] Class Counsel have continued this unrelenting course of intemperate and unseemly attacks on Objectors in their memorandum in support of the motion to assess the bond.

Class Counsel are attempting to use the device of this bond motion to curtail

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[1] These attacks have been so repeatedly made by Class Counsel in this case, so repeatedly rebuffed, and countered with facts actually relevant to a material issue in the case (adequacy of class counsel), that Class Counsel's brazen refusal to stop can only be viewed as contumacious, and itself sanctionable. *See*, *Thomas v. Tenneco Packaging Co.*, 293 F.3d 1306, 1308, 1323 (11th Cir. 2002) **("[w]e conclude that an attorney who submits documents to the district court that contain *ad hominem* attacks directed at opposing counsel is subject to sanction under the court's inherent power to oversee attorneys practicing before it"; and noting that such attacks occurring on "repeated occasions. . . further buttressed our conclusion.")** See also, *In re First City Bancorporation of Texas, Inc.*, 282 F.3d 864 (5th Cir. 200); *In re Cordova-Gonzalez*, 996 F.2d 1334 (1st Cir. 1993). Furthermore, if Plaintiffs Counsel's interpretation were to prevail, this would presumably be the only area of American law in which citizens, i.e., absent class members filing objections, are not permitted to be represented by experienced counsel. This would also cut against the grain of all established rules of professional ethics.

objectors' appellate rights, and as a form of punitive attack on these objectors for having the temerity to challenge the seriously flawed and repeatedly amended class action settlement. Class Counsel have devoted a significant amount of their argument to this trial court irrelevantly attacking the merits of Objectors' appeal. However, it is well established that whether an appeal is "frivolous" is solely within the purview of the appellate court, not the district court. *Cooter & Gell v. Hartmarx,* 496 U.S. 384, 407; *In re American President Lines, Inc.*, 779 F.2d 714, 717 (D.C. Cir. 1985). The appellate court is generally better qualified to determine whether an appeal lacks merit. *Conner v. Travis County*, 209 F.3d 794, 801 (5th Cir. 2000). Only the appellate court has the authority to impose sanctions for a frivolous appeal. *See, e.g., In re Vasseli*, 5 F.3d 353 (9th Cir. 1993); *Cheng v. GAF Corp*., 713 F.2d 886, 891-92 (2d Cir. 1983); *In re Emergency Beacon Corp.*, 790 F.2d 285, 288 (2d Cir. 1986).

As this Court already held in a prior opinion in this very case, "Rule 7 was not intended to be used as a means of discouraging appeals, even if perceived to be frivolous. See *In re American President Lines, Inc*., 250 U.S. App. D.C. 324, 779 F.2d 714, 717 (1985) . . . even if these appeals are frivolous and solely an attempt to leverage an inventory settlement, Class Counsel has adequate remedies available to it in the court of appeals." *In re: Diet Drugs*, No. 1203, 2000 U.S. Dist. LEXIS 16085, at *18-19 (E.D. Penn. 2000).

II. THE APPEALS BOND SOUGHT MAY NOT BE IMPOSED BECAUSE THE LANGUAGE OF THE RELEVANT STATUTES CLEARLY DISTINGUISHES COSTS FROM "DAMAGES RESULTING FROM DELAY OR DISRUPTION OF SETTLEMENT ADMINISTRATION CAUSED BY A FRIVOLOUS APPEAL"

Class Counsel have requested, inter alia, that the two Objectors and their counsel post an appeal bond of at least $25,000, purportedly pursuant to Fed. R. App. P. 7. Class Counsel have cited to district court decisions from outside the Third Circuit, which are contrary to the law of this Court and Circuit, claiming that an appeals bond may include damages resulting from "delay or disruption of settlement administration caused by a frivolous appeal." *Class Counsel's Motion to Impose a Bond on Appellants Angela Duffy and Debra Rhea* at 5.

In their headlong rush to deprive Objectors of their right to appeal through the imposition of unreasonably and impermissibly heavy financial burdens, Class Counsel have demonstrated a flagrant disregard for the holdings of the Court of Appeals for the Third Circuit, as well as for those of numerous other circuits considering this issue and ruling in accord with this Circuit. Class Counsel present no relevant controlling authority to support their position that the type of potential damages they speculate on and emote about are available as a component of an appeal bond.

Indeed, the clearly established law in the Third Circuit, and among numerous other courts, is that Rule 7 costs on appeal may include only those costs listed in Rule

39(e). Rule 39 does not list "damages resulting from the delay and/or disruption of settlement administration" as a recoverable cost. Class Counsel purport to rely in their motion on the reasoning of the opinions of the District Court for the Southern District of New York in *In re: NASDAQ Market-Makers*, 187 F.R.D. 124 (S.D.N.Y. 1999), and of the District of Maine in *In Re Compact Disc Minimum Advertised Price Antitrust Litig.*, 2003 WL 22417252 at *1 (D. Me. Oct. 7, 2003).

Although Plaintiffs' counsel actually cite a prior opinion from this Court in this case, drawing on general remarks regarding bonds therein, counsel misleadingly and utterly fail to mention that this Court **refused to impose a cost bond including damages resulting from the delay incident to appeal.** *See In re: Diet Drugs*, No. 1203, 2000 U.S. Dist. LEXIS 16085 (E.D. Penn. 2000) (copy attached hereto). That opinion involved a group of Objectors who filed an appeal challenging various aspects of an earlier version of the class action Settlement Agreement. Class Counsel asserted that the appeals were "meritless and solely an attempt to leverage settlements in separate cases or obtain unauthorized fees." *Id.* at *4. Class Counsel also claimed that "the appeals would cause the class to suffer significant and possibly irreparable harm resulting from a delay in the provision of . . . benefits to class members." *Id.* Objectors countered that Class Counsel were seeking to impose a bond requirement in order to squelch the Objectors' appeals. ***The Court held that such could not be exacted from***

the objector/appellants.[2] *See id.* "'[C]osts' under Rule 7 are limited to the costs enumerated under *Federal Rules of Appellate Procedure 7* and *39* and *28 U.S.C. § 1920.*" Id. Class Counsel's failure to disclose this holding in its brief is simply inexplicable under the good faith requirements generally imposed on officers of the court. See *Hirschensohn v. Lawyers Title Ins. Corp.*, 1997 U.S. App. LEXIS 13793 (3rd Cir. 1997); and *McDonald v. McCarthy*, 966 F.2d 112, 115 (3d Cir. 1992); *In re American President Lines, Inc.*, 779 F.2d 714, 716 (D.C. Cir. 1985).

Additionally, although Class Counsel correctly state that expenses for clerk and court fees, photocopy charges, and court reporter transcription fees are the types of costs contemplated under the rule, they have made no attempt to quantify those costs, instead choosing to simply speculate that "there is every reason to think" that costs associated with this appeal would be "at least as great" as those in a prior appeal.[3] Such refusal to reduce the anticipated cost to any reasonable sum certain amounts to a complete failure by Class Counsel to meet their burden, on a motion for a bond for

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[2]This Court emphasized the "subtle but important difference between cost bonds and supersedeas bonds," with damages caused by delay only being appropriate under the latter. Id. at *15.

[3]It should be noted that in the prior appeal, cited by Class Counsel, ordering a $25,000 bond, this Court found that the size of the bond would not work a financial hardship on the objectors because the eight objectors involved in the appeal were jointly and severally liable for the entire amount of the bond. Id. at *20. Here, there would be only two objectors to shoulder the cost of any bond.

costs, to specify permissible anticipated costs.

CONCLUSION

For all of the reasons set forth hereinabove, it is respectfully submitted that this Court must deny *Class Counsel's Motion to Impose a Bond on Appellants Angela Duffy and Debra Rhea*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The Undersigned hereby certifies that on May 6, 2005, a true and correct copy of the foregoing, *Objectors' Memorandum in Opposition to Class Counsel's Motion to Impose a Bond on Appellants Angela Duffy and Debra Rhea*, was electronically filed with the Clerk of the Court for the United States District Court for the Eastern District of Pennsylvania using the CM/ECF system. This document is available for viewing and downloading from the ECF system.

/S/ Robert W. Bishop
Counsel for Objectors

The Undersigned hereby certifies that a true and correct copy of the foregoing, *Objectors' Memorandum in Opposition to Class Counsel's Motion to Impose a Bond on Appellants Angela Duffy and Debra Rhea*, with attached tendered Pretrial Order No. _____, was mailed by First Class U.S. Mail, postage prepaid, on this the 6th day of May, 2005, to the following:

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IN RE: DIET DRUGS (PHENTERMINE, FENFLURAMINE, DEXFENFLURAMINE) PRODUCTS LIABILITY LITIGATION THIS DOCUMENT RELATES TO: SHEILA BROWN, et al. v. AMERICAN HOME PRODUCTS CORPORATION

MDL DOCKET NO. 1203, CIVIL ACTION NO. 99-20593

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

2000 U.S. Dist. LEXIS 16085

November 6, 2000, Decided
November 6, 2000, Filed

DISPOSITION: [*1] Class Counsel's motions GRANTED in part DENIED in part. Motions denied with respect to request that bond of $ 5,000,000.00 be imposed on each set of objectors. Motions granted in that Objectors shall be jointly and severally responsible for posting $ 25,000.00 bond to ensure payment of costs incurred by class on appeal should the class prevail.

LexisNexis(R) Headnotes

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JUDGES: LOUIS C. BECHTLE, J.

OPINIONBY: LOUIS C. BECHTLE

OPINION:

MEMORANDUM AND PRETRIAL ORDER NO. 1488

Bechtle, J.

November 6, 2000

Presently before the court are: (1) Class Counsel's Motion to Impose Bond on Objectors for the Filing of an Appeal and Jane Scuteri, et al.'s, Vinson Carithers, III's and the Dunn Objectors' oppositions thereto; and (2) Class Counsel's Motion to Impose a Bond Requirement on the Jamail Objectors for the Filing of an Appeal, Objector Tracy Bennett-Johns' Response thereto and Class Counsel's Reply to said response. For the reasons set forth below, the motions will be granted in part and denied in part.

I. BACKGROUND

Class Counsel moves the court to impose a sizable supersedeas bond n1 upon the Napoli, Fleming, Mulligan, Gonzalez, Alexander, Benjamin, Blizzard and Jamail objectors (collectively the "Objectors") [*2] as a condition of pursuing an appeal. The appeals at issue relate to this court's approval of a class action Settlement involving plaintiffs who allege that they have suffered, inter alia, heart valvulopathy from the ingestion of the diet drug combination known as Fen-Phen.

n1 See infra II.A (defining supersedeas bonds).

In Pretrial Order No. 1415, this court certified a Settlement Class and approved the Nationwide Class Action Settlement Agreement between the parties to this action on August 28, 2000. n2 Pretrial Order No. 1415 was the culmination of the Settlement approval process, which began in November 1999 when the court ordered all Class Members and other interested parties to submit comments in opposition to the proposed Settlement before March 30, 2000. (*Pretrial Order No. 997 P 18.)* Persons wishing to opt-out of the class were required to do so by that date. *Id. P 19.* Also part of the approval process was a fairness hearing held in May 2000 at which anyone who had [*3] submitted objections pursuant to Pretrial Order No. 997 was given the opportunity to offer evidence concerning the proposed Settlement. See Mem. and Pretrial Order No. 1415 at 14 (discussing Fairness Hearing).

n2 The class certified by the court includes:

> All persons in the United States, its possessions and territories who ingested Pondimin (R) and/or Redux (R) ("Diet Drug Recipients"), or their estates, administrators or other legal representatives, heirs or beneficiaries ("Representative Claimants"), and any other person asserting the right to sue AHP or any Released Party . . . by reason of their personal relationship with the Diet Drug Recipient, . . .

(*Pretrial Order No. 1415 P 3.)*

Although the appeals may challenge various aspects of the Settlement, it appears that the Objectors primarily challenge its linking of class members' receipt of medical monitoring benefits to final judicial approval. (Tr. 10/25/00 at 62-63.) n3

n3 At the October 25, 2000 status conference for this MDL 1203, Edward Blizzard, liaison counsel for the Objectors, and Kenneth J. Chesebro, counsel for the Napoli Objectors, spoke on behalf of the Objectors regarding these two motions. (Tr. 10/25/00 at 60.)

[*4]

Class Counsel claims that the Objectors' attorneys purposefully left a few clients in the Settlement Class in order to gain standing to appeal. (Mot. to Impose Bond on Objectors for the Filing of an Appeal ("Mot. to Impose Bond on Certain Objectors") at 3 n.1.) Class Counsel asserts that the appeals are meritless and solely an attempt to leverage settlements in separate cases or obtain unauthorized fees. Id. As support for this argument, Class Counsel states that the Objectors either did not participate at all in the Fairness Hearing, or participated only marginally. See *id. at 4-10* (setting forth Class Counsel's characterization of Objectors' participation in Fairness hearing and overall Settlement approval process). According to Class Counsel, these appeals will cause the class to suffer significant and possibly irreparable harm resulting from a delay in the provision of medical and monetary benefits to class members if a bond is not issued. *Id. at 10-11.* Accordingly, Class Counsel moves for imposition of a bond in the amount of $ 5,000,000.00 upon each group of objectors pursuant to *Federal Rules of Appellate Procedure 7* & *8* and *Federal Rule* [*5] *of Civil Procedure 62(d).*

The Objectors' attorneys contend that they are advancing the legitimate objections of over 2,000 clients and that they participated meaningfully in the Fairness Hearing and the Settlement approval process. See Tr. 10/25/00 at 64-65 (reflecting Mr. Blizzard's argument that Objectors coordinated presentation at Fairness Hearing through him). According to the Objectors, Class Counsel only seeks to impose a bond requirement in order to squelch the Objectors' appeals. *Id. at 64.* They note that Class Counsel has not sought to impose bond on a number of other appellants, including Interneuron Pharmaceuticals, Inc., Les Laboratories Servier, Blue Cross/Blue Shield, CIGNA and several other subrogation interests. *Id. at 63.*

II. DISCUSSION

Class Counsel argues that *Federal Rules of Appellate Procedure 7* & *8*, *Federal Rule of Civil Procedure 62(d)*, as well as the court's inherent equity power permit the court to impose a sizable bond on the filing of an appeal. Accordingly, they request that the court require each objector to post a bond to cover: (1) costs on appeal; (2) attorney's fees on appeal; and (3) damages [*6] resulting from the delay and/or disruption of Settlement administration caused by the appeal. Class Counsel suggests that a bond of not less that $ 5,000,000.00 be imposed upon each set of objectors.

The Objectors argue that none of the rules cited by Class Counsel authorize the relief sought and that even if such a bond were authorized, Class Counsel have not demonstrated that the Objectors are improperly interfering with the judgment and thereby delaying receipt of Settlement benefits by class members.

A. A Supersedeas Bond May not be Imposed in the Absence of a Stay

Class Counsel characterizes the type of bond that they request as a "supersedeas" bond. (Mot. to Impose Bond on Certain Objectors at 1; Mot. to Impose Bond on Jamail Objectors at 1.) However, as discussed below, the district court has no power to impose a supersedeas bond in the absence of a stay. Furthermore, it appears that the nature of the bond requested by class counsel is a cost bond rather than a supersedeas bond.

A supersedeas bond is defined as a "bond required of one who petitions to set aside a judgment or execution and from which the other party may be made whole if the action is unsuccessful. [*7] " Black's Law Dictionary 738 (6th ed. 1990). *Federal Rule of Civil Procedure 62(d)* provides that an appellant may obtain a stay of judgment by giving a supersedeas bond. *Fed. R. Civ. P. 62(d).* A party must move in the district court for approval of a supersedeas bond. *Fed. R. App. P. 8(a)(1)(B).*

As noted by the Court of Appeals for the Second Circuit in *Adsani v. Miller, "cost bonds and supersedeas bonds 'should not be confused.'" Adsani, 139 F.3d 67, 70 n.2 (2d Cir. 1998)* (quoting Wright, Miller and Cooper, 16A Federal Practice & Procedure: Jurisdiction 2d § 3953 at 278 (1996)). As the Adsani court explained, a supersedeas bond is retrospective and covers sums related to the merits of the underlying judgment and a stay of its execution, whereas a cost bond is prospective and relates to the potential expenses of litigating the appeal. Id. (citation omitted).

The language of *Federal Rule of Civil Procedure 62* indicates that a co-requisite to imposition of a supersedeas bond is a motion for a stay by the appellant. For example, Rule 62(d) states that "when an appeal is taken the appellant by giving a supersedeas bond may obtain a stay . . . . The stay [*8] is effective when the supersedeas bond is approved by the court." The court agrees with the Objectors that these Rules do not condition the appeal on posting of a bond. Rather, they only condition the stay of execution, not the right to appeal, on the posting of a supersedeas bond. See *In re Farrell Lines, Inc., 245 U.S. App. D.C. 393, 761 F.2d 796, 797-98 (D.C. Cir. 1985)* (stating that failure to furnish supersedeas bond does not forfeit appellant's right to appeal). Also, nothing in the language of these rules indicates that an appellee can move the court for imposition of a supersedeas bond.

Class Counsel cites no case actually holding that a supersedeas bond can be imposed in the absence of a motion for a stay. See, e.g., *United States ex rel Terry Inv. Co. v. United Funding & Investors, Inc., 800 F. Supp. 879, 881 (E.D.Cal. 1992)* (holding that court had no power to impose supersedeas bond absent stay, despite appellee's argument that appeal constituted de facto stay in class action). Class Counsel does cite In re NASDAQ Market Market-Makers Antitrust Litigation for the proposition that filing a notice of appeal in a class action acts [*9] as a de facto stay and that the district court can impose a "substantial supersedeas bond" on objectors who use appellate threats to coerce a settlement for private, unrelated cases. *In re NASDAQ, 187 F.R.D. 124, 127-28 (S.D.N.Y. 1999).* However, that case dealt with imposition of an appeal bond n4 under Rule 7, not a supersedeas bond. *Id. at 127.*

> n4 Cost bonds are also known as appeal bonds. See Black's Law Dictionary 97, 346 (6th ed. 1990) (defining appeal bonds and cost bonds in reference to *Fed. R. App. P. 7*).

Although the consequences of an appeal from approval of a class action settlement may be similar to a stay, the court nevertheless concludes that it has no authority to impose a supersedeas bond in the absence of an appellant's motion for a formal stay of execution.

2. The Court May Impose a Bond to Cover Costs on Appeal

Under *Federal Rule of Appellate Procedure 7*, the district court "may require an appellant to file a bond or provide other security in [*10] any amount necessary to ensure payment of costs on appeal." *Fed. R. App. P. 7.* Failure to comply with the Rules of Appellate Procedure is grounds "for such action as the court of appeals deems appropriate, which may include dismissal of the appeal." *Fed. R. App. P. 3(a).* Thus, an appeal can effectively be conditioned on the appellant's posting of a bond required by the district court. See generally *Zebrowski v. Hanna, 973 F.2d 1001, 1006 (1st Cir. 1992)* (citing *Sckolnick v. Harlow, 820 F.2d 13 (1st Cir. 1987))* (noting that failure to post Rule 7 bond may result in dismissal); *Patrick v. John Odato Water Serv., 26 V.I. 361, 767 F. Supp. 107, 109 (D.V.I. 1991)* (discussing dismissal as sanction for failure to timely post bond); but see Wright, Miller & Cooper, 16A Federal Practice & Procedure: Jurisdiction 2d § 3953 at 278-79 (1996) (stating that "failure to post such a bond is easily correctable and, standing alone, should not warrant dismissal").

The Third Circuit has held that "costs" under Rule 7 are defined in reference to *Federal Rule of Appellate Procedure 39* n5 and *28* U.S.C. § 1920. n6 *Hirschensohn v. Lawyers Title Ins. Corp., 1997 U.S. App. LEXIS 13793, Civ. No. 96-7312, 1997 WL 307777,* [*11] *2-3 (3d Cir. June 10, 1997); see *McDonald v. McCarthy, 966 F.2d 112, 115 (3d Cir. 1992)* (stating that "ordinarily, 'costs' for the purposes of Rule 39 should be defined with reference to *28 U.S.C. § 1920*"). These costs include printing and producing copies of briefs, appendices, records, court reporter transcripts, premiums or costs for supersedeas bonds, or other bonds to secure

rights pending appeal, and fees for filing the notice of appeal. *Id. 1997 U.S. App. LEXIS 13793,* Id. at *1. Hirschensohn also held, however, that attorneys' fees were not included in the term "costs" for the purposes of Rules 7 and 39. Id.; see also *Gerstein v. Micron Tech., Inc., 1993 U.S. Dist. LEXIS 21213,* *2-3, Civ. No. 89-1262 (D. Idaho Dec. 6, 1993) (stating that costs under Rule 7 are those that may be taxed against unsuccessful litigant under Rule 39, and do not include attorney's fees); *Donaldson v. Imperial Cas. & Indem. Co., 1989 U.S. Dist. LEXIS 17920,* *2, Civ. No. G88-52 (W.D. Mich. Sept. 21, 1989) (citations omitted) (same).

n5 Under Rule 39, the following costs on appeal are taxable in the district court:

> (1) the preparation and transmission of the record;
>
> (2) the reporter's transcript, if needed to determine the appeal;
>
> (3) premiums paid for a supersedeas bond or other bond to preserve rights pending appeal; and
>
> (4) the fee for filing the notice of appeal.

Fed. R. App. P. 39(e). [*12]

n6 Under *28 U.S.C. § 1920,* taxable costs are:

> (1) Fees of the clerk and marshal;
>
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
>
> (3) Fees and disbursements for printing and witnesses;
>
> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
>
> (5) Docket fees under section 1923 of this title; and
>
> (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses and costs of special interpretation on services under section 1928 of this title.

28 U.S.C. § 1920.

Employing a broader reading of Rule 7, the Court of Appeals for the Second Circuit has held that attorneys' fees are part of "costs" when the statute providing the substantive law of the case authorizes an award of attorney's fees to the prevailing party. See *Adsani, 139 F.3d at 71-76* (including attorney's fees as "costs" under Rule 7 in copyright infringement action); see also *In re NASDAQ, 187 F.R.D. at 128* [*13] (including attorney's fees in Rule 7 bond where appeal governed by Clayton Act). Also in Adsani, the Second Circuit rejected the appellant's argument that Rule 39 defines "costs" for all of the Rules of Civil Procedure. *Adsani, 139 F.3d at 75.* Rather, the court noted, Rule 39 "defines the circumstances under which the costs should be awarded." Id. Thus, according to the Second Circuit, "costs" under Rule 7 may include "costs" as defined by the relevant substantive statute governing the appeal, and are not limited to the "costs" enumerated in Rule 39. *Id. at 75 n.9;* see also *Montgomery & Assocs. v. CFTC, 259 U.S. App. D.C. 479, 816 F.2d 783, 784 (D.C. Cir. 1987)* (holding that "costs" in Rule 39 may include attorney's fees where substantive statute includes attorney's fees as "costs"). n7

n7 In Sckolnick v. Harlow, not cited by Class Counsel or Objectors, the First Circuit affirmed the district court's imposition of a Rule 7 bond to secure costs, including attorney's fees, that might be awarded pursuant to Rules 38 and 39. *Sckolnick, 820 F.2d 13, 15 (1st Cir. 1987).* However, the court's holding was based on a conclusion that the district court did not abuse its discretion in determining the appeal to be frivolous and predicting that sanctions might be imposed under Rule 38. Id. It appears that the pro se plaintiff did not argue that Rule 7 bonds did not include attorney's fees or damages, nor did the court engage in any analysis of Rule 7. Id. Thus, this case is of limited precedential value.

[*14]

Class Counsel's argument that attorney's fees should be included in the "costs" covered by a Rule 7 bond is unavailing. The weight of authority indicates that "costs" under Rule 7 generally do not include attorney's fees. Furthermore, Adsani and In re NASDAQ appear to stand for the limited proposition that statutorily authorized costs may be included in an appeal bond authorized by

Rule 7. In any event, they are not controlling authority in this district.

Class Counsel also cites In re NASDAQ for the proposition that a bond imposed under Rule 7 can secure damages caused by delay incident to an appeal. (Mot. to Impose Bond on Certain Objectors at 11.) In that case, the district court imposed a bond of over $ 100,000.00 on an objector whose appeal from approval of a class action settlement was found by the court to be "objectively unreasonable." *In re NASDAQ, 187 F.R.D. at 128.* Included in the bond were projected costs to the settlement trust resulting from the delay incident to appeal. *Id. at 128-29.* The court noted that "an appeal bond provides a 'guarantee that the appellee can recover from the appellant the damages caused by the delay [*15] incident to the appeal.'" *Id. at 128* (quoting *Morgan Guaranty Trust Co. of N.Y. v. Republic of Palau, 702 F. Supp. 60, 65 (S.D.N.Y. 1988)).* However, the two cases cited by the district court as support for this proposition dealt with supersedeas bonds, not costs bonds imposed under Rule 7. See *Morgan, 702 F. Supp. at 65* (stating that "a supersedeas bond . . . provides a guarantee that the appellee can recover . . . damages caused by the delay"); *Omaha Hotel Co. v. Kountze, 107 U.S. 378, 392, 27 L. Ed. 609, 2 S. Ct. 911 (1883)* (discussing measure of damages recoverable on "an appeal bond given for supersedeas of execution on a decree of foreclosure"). n8 It appears that In re NASDAQ overlooked the subtle but important difference between cost bonds and supersedeas bonds, and thus does not offer persuasive support for Class Counsel's argument.

n8 Although Omaha Hotel does use the term "appeal bond," it is clear from reading the case that the bond at issue was a "supersedeas bond." See *Omaha Hotel, 107 U.S. at 379* (stating that "defendants appealed, and, to obtain supersedeas of execution, gave the appeal bond which is the subject of the present controversy").

[*16]

Accordingly, the court concludes that for purposes of the instant case, "costs" under Rule 7 are limited to the costs enumerated under *Federal Rules of Appellate Procedure 7* and *39* and *28 U.S.C. § 1920. Hirschensohn, 1997 U.S. App. LEXIS 13793, 1997 WL 307777* at *2-3.

C. The Court will Require Objectors to Post a Bond in the Amount of $ 25,000.00, for which Objectors are Jointly and Severally Responsible

A district court may not impose bond in an amount beyond what is necessary to ensure adequate security if to do so would effectively preclude pursuit of an appeal. See *Lindsey v. Normet, 405 U.S. 56, 77-79, 31 L. Ed. 2d 36, 92 S. Ct. 862 (1972)* (holding statute conditioning appeal on posting of double bond unconstitutional under Fourteenth Amendment equal protection clause). n9 Nor may a bond be imposed for the purpose of discouraging exercise of the right to appeal. See *Clark v. Universal Builders, Inc., 501 F.2d 324, 341 (7th Cir. 1974)* (stating that "any attempt by a court at preventing an appeal is unwarranted and cannot be tolerated"). However, although requiring security for payment of costs has a deterrent effect on [*17] the exercise of appellate rights, the government nevertheless has the power to deny access to the courts if the condition of reasonable security is not met. *Cohen v. Beneficial Loan Corp., 337 U.S. 541, 552, 93 L. Ed. 1528, 69 S. Ct. 1221 (1949); Adsani, 139 F.3d at 77.*

n9 Presumably, a challenge to a bond imposed under the Federal Rules of Appellate procedure would be based on the due process clause of the Fifth Amendment.

Rule 7 was not intended to be used as a means of discouraging appeals, even if perceived to be frivolous. See *In re American President Lines, Inc., 250 U.S. App. D.C. 324, 779 F.2d 714, 717 (1985)* (denying bond requested because it failed as legitimate means of protecting appellee against possibility that appeal might turn out to be frivolous). There are means other than bonds which adequately protect an appellee against frivolous appeals. One such device is an immediate motion to dismiss filed in the court of appeals. Id. This is available [*18] at the beginning of the appeal and may provide relief before expenses begin to mount. Id. Another protective device is Rule 38, under which just damages and single or double costs, including attorney's fees, may be awarded to the appellee if the Court of Appeals determines that the appeal was frivolous. *Fed. R. App. P. 38*; *Donaldson, 1989 U.S. Dist. LEXIS 17920,* at *4. Thus, even if these appeals are frivolous and solely an attempt to leverage an inventory settlement, Class Counsel has adequate remedies available to it in the court of appeals. n10

n10 This court has the power to hold the Objectors' attorneys liable for unreasonably and vexatiously multiplying proceedings under its inherent equitable powers and *28 U.S.C. § 1927.* See *Hall v. Cole, 412 U.S. 1, 4-5, 36 L. Ed. 2d 702, 93 S. Ct. 1943* (noting that federal courts may exercise equitable powers to award attorney's fees); *Williams v. Giant Eagle Mkts., Inc., 883 F.2d 1184, 1191 (3d Cir. 1989)* (stating that § 1927 sanctions should only be imposed in instances of serious and studied disregard for

> judicial process). It does not follow, however, that the court can include expenses related to this conduct in a Rule 7 bond and condition the appeal upon posting of that bond. Requests for such sanctions are best addressed by the court of appeals under Rule 38.

[*19]

To grant Class Counsel's request and impose a bond of $ 5,000,000.00 upon each objector would be excessive. First, a $ 5,000,000.00 bond requirement on each set of objectors would effectively squelch the right to appeal for many if not all of them. Secondly, the "costs" which this court is authorized to consider in calculating the amount of bond will hardly amount to $ 40,000,000.00 ($ 5,000,000.00 times 8 sets of objectors).

The court concludes that $ 25,000.00 is a reasonable estimate of Class Counsel's costs in defending these appeals. These costs include printing and producing copies of briefs, appendices, records and court reporter transcripts. See *Hirschensohn, 1997 U.S. App. LEXIS 13793, 1997 WL 307777* at *1 (setting out costs under Rule 7). The service list in this case contains 87 attorneys that must be served with copies of briefs. Thus, the printing expenses alone for defending this appeal may run into the thousands of dollars. See 3d Cir. R. 39.3 (discussing taxation of reproduction costs of briefs and appendices).

Presumably, some of the objectors will utilize parts of the record and reproduce exhibits that others will not. Also, some objectors will likely raise different [*20] issues in their appeals than others, causing the class to incur either more or less expense than incurred defending the appeals of other objectors. Accordingly, the Objectors will be jointly and severally responsible for posting the $ 25,000.00 bond. The court believes that this arrangement will adequately secure recovery of costs should the class prevail but will not work a financial hardship on the exercise of the Objectors' rights to appeal. See *Adsani, 139 F.3d at 76-78* (holding that $ 35,000.00 bond not unconstitutional barrier to appeal where no showing of inability to pay).

III. CONCLUSION

For the reasons set forth above, Class Counsel's motions will be granted in part and denied in part. An appropriate order follows.

PRETRIAL ORDER NO. 1488

AND NOW, TO WIT, this 6th day of November, 2000, upon consideration of: (1) Class Counsel's Motion to Impose Bond on Objectors for the Filing of an Appeal and Jane Scuteri, et al.'s, Vinson Carithers, III's and the Dunn Objectors' oppositions thereto; and (2) Class Counsel's Motion to Impose a Bond Requirement on the Jamail Objectors for the Filing of an Appeal, Objector Tracy Bennett-Johns' [*21] Response thereto and Class Counsel's Reply to said response; IT IS ORDERED that Class Counsel's motions are GRANTED in part and DENIED in part. The motions are denied with respect to the request that a bond of $ 5,000,000.00 be imposed on each set of objectors. The motions are granted in that the Objectors shall be jointly and severally responsible for posting a $ 25,000.00 bond to ensure payment of costs incurred by the class on appeal should the class prevail.

LOUIS C. BECHTLE, J.